

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSH LAWSON and CHRISTOPHER
FRANKLIN,)
Plaintiffs,) CASE NO. C12-1994-MAT
v.)
CITY OF SEATTLE, et al.,) ORDER RE: MOTIONS FOR
Defendants.) SUMMARY JUDGMENT

INTRODUCTION

16 Plaintiffs Josh Lawson and Christopher Franklin bring this action against the City of
17 Seattle, Seattle Police Officer Bradley Richardson, and Seattle Police Officers 1-4, alleging
18 violations of their federal constitutional rights under 42 U.S.C. § 1983 and violations of state
19 law. (Dkt. 1.) Plaintiffs' constitutional claims include unreasonable force and seizure in
20 violation of the Fourth Amendment, and liability of the City of Seattle through policies,
21 practices, and/or customs causing the constitutional violations. Plaintiffs' state law claims
22 include negligence, intentional and negligent infliction of emotional distress, assault and

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01 battery, false arrest, and false imprisonment.

02 Defendants City of Seattle and Richardson now move for summary judgment (Dkt. 19)
03 and partial summary judgment (Dkt. 21) respectively. Plaintiffs oppose the motions. (Dkts.
04 39 and 40.) Having considered the motions, oppositions, and all materials filed in support, as
05 well as the remainder of the record, the Court GRANTS in part and DENIES in part the pending
06 motions for the reasons set forth below.¹

07 BACKGROUND

08 On November 16, 2010, Anthony Fantozzi was assaulted as he walked through an alley
09 on his way to a bar, “The Funhouse,” located in downtown Seattle. (Dkt. 24 at 1.) Fantozzi
10 felt something hard and blunt hit the back of his head, was punched in the face, and fell to the
11 ground. (*Id.* at 1-2.) He saw two black males standing over him, jumped up, and ran to The
12 Funhouse, with his face covered in blood. (*Id.* at 2.) Fantozzi pointed out the two men who
13 had assaulted him to Joanna Crinnion, a fellow employee. (*Id.*)

14 Crinnion called 911 to report the assault, with Fantozzi providing information in the
15 background. (*Id.*) In the call, Fantozzi and Crinnion reported Fantozzi had been assaulted by
16 two tall, skinny, African-American males in their mid-to-late twenties, both wearing jeans and
17 one wearing a black or dark “hoodie” sweatshirt, and the individuals were last seen turning left
18 (East) on Denny Way. (Dkt. 23, Ex. A (911 call) and Ex. B (computer-aided dispatch (CAD)
19 report).)

20 _____
21 1 The Court also herein *sua sponte* grants judgment in favor of “Seattle Police Officers 1-4.”
22 Discovery in this matter has been complete since February 2014 and the trial is set to commence within
a matter of weeks. Plaintiffs have had ample opportunity to identify and name these individuals. *See*
Gillespie v. Civiletti, 629 F.2d 637, 642 (9th Cir. 1980). Because they remain unnamed and unserved at
this late date, plaintiffs’ claims against these John Doe defendants are appropriately DISMISSED.

01 The parties present differing versions of the events occurring on the night of Fantozzi's
02 assault. Plaintiffs Lawson and Franklin explain they came to downtown Seattle to celebrate
03 their acceptance into a training program. Lawson, who was wearing white sweat pants and a
04 black t-shirt, and Franklin, who was wearing jeans and a dark hoodie, began to walk around and
05 decided to visit a bar near the Seattle Center. (Dkt. 42 at 1; Dkt. 44 at 1-2.) As they walked,
06 they observed a police car, "trotted" across a street to avoid a different car, and proceeded down
07 an alley on their way to the bar. (Dkt. 42 at 2; Dkt. 44 at 2; Dkt. 22, Ex. A at 42 and Ex. B at 8.)

08 Defendant Richardson, who was working patrol, heard the dispatch as to the 911 call
09 and was within a couple of minutes of the area of the call. (Dkt. 25 at 2.) In checking the
10 area, Richardson observed a thin black male in his late teens, wearing a black t-shirt and white
11 sport/sweat pants, and perceived that individual as both acting as though he was trying not to be
12 seen and watching Richardson. (*Id.*) He does not recall seeing anyone else in the area. (*Id.*
13 at 3.) Richardson then observed the same black male quickly cross Sixth Avenue North to the
14 west side, where he joined another black male, who was wearing jeans and a dark hoodie, and
15 both men began running west and then south through an alley. (*Id.*)

16 Richardson advised dispatch he had two suspects running in the alley behind the Best
17 Western Hotel. (Dkt. 23, Ex. B at 5; Dkt. 25 at 4; Dkt. 33-1 at 2.) As he approached the alley
18 entrance, he observed the same two males walking briskly through the alley, advised radio as to
19 his location, and exited his patrol car. (Dkt. 25 at 4.) Richardson maintains the individual
20 wearing the hoodie had his hands in his hoodie pockets, that he advised "Stop, Police!", and that
21 both men continued to walk towards him. (*Id.*) He advised, "Stop, Police, show me your
22 hands and get on the ground!", but the men continued to close the distance. (*Id.*) Richardson

01 drew his weapon, stepped towards the men, and yelled, “Get on the ground!”, with his weapon
 02 “at the low ready,” meaning pointed at the ground, but out and available. (*Id.*) At that point,
 03 both men stopped, some five to six feet away, and “began to comply.” (*Id.* at 5.)

04 Lawson (wearing the sweat pants and t-shirt) and Franklin (wearing the jeans and
 05 hoodie) attest that, as they were walking down the alley, they saw a police officer (Richardson)
 06 behind his car door, with his gun drawn and pointing at them, and yelling – only once – “Get on
 07 the ground!” (Dkt. 42 at 3; Dkt. 44 at 2.) Lawson and Franklin quickly got down, with
 08 Lawson’s knees and hands on the ground, and Franklin’s knees on the ground and hands behind
 09 his head, whereupon Richardson raised his boot and kicked Lawson on the right side of his
 10 face/jaw. (*Id.*) A police officer put knees on Lawson’s chest/throat, two other officers put
 11 knees on his stomach, his face was pushed onto the ground, and his arms were handcuffed
 12 behind his back. (Dkt. 44 at 2.) Officers pushed Franklin’s face onto the ground and put his
 13 hands in handcuffs behind his back. (Dkt. 42 at 3.)

14 Richardson contends that, while Franklin began to lay flat on the ground, Lawson
 15 slowly crouched down in a squat, and stayed that way despite being advised to lay flat. (Dkt.
 16 25 at 5.) Although Seattle Police Officer John Schweiger had by then arrived on the scene,
 17 Richardson did not yet know of Schweiger’s presence, feared Lawson would lunge at him from
 18 the squatting position, and used a flat foot, front push kick to Lawson’s chest, knocking him
 19 backwards. (*Id.*) Richardson and Schweiger thereafter rolled Lawson onto his stomach. (*Id.*
 20 at 5-6.) Richardson did not assist with handcuffing Franklin. (*Id.*)

21 Schweiger, as he was driving to the scene, observed Richardson pull into the alley, exit
 22 his car, position himself behind the opened door, and give verbal commands of some kind to

01 Lawson and Franklin. (Dkt. 33-1 at 2.) Schweiger attests he saw Lawson and Franklin come
 02 within eight feet of Richardson, and Richardson emerge from his position of cover with his
 03 handgun drawn in the low-ready position and order the suspects to the ground. (*Id.*) Franklin
 04 went to the ground belly down, Lawson went into and remained in a crouching position, and
 05 Richardson knocked Lawson over with a front push kick to the chest. (*Id.* at 3.) Schweiger
 06 took control of Lawson's right foot/leg and, with Richardson's assistance, rolled Lawson over
 07 and under control. (*Id.*)

08 Some ten minutes or more after officers handcuffed Lawson and Franklin, Seattle
 09 Police Officer Brit Kelly (née Sweeney) brought Fantozzi and Crinnion to the scene for a
 10 "show-up." (Dkt. 25 at 6.) In a declaration provided to defendants, Fantozzi attests he told a
 11 female police officer (Kelly) "'those were the guys[]'" and then that he "'was pretty sure those
 12 were the guys'" but he could not be "'100% sure[,]'" and that Kelly told him "she was going to
 13 take that as a positive identification." (Dkt. 24 at 3.) In a subsequent declaration provided to
 14 plaintiffs, Fantozzi attests he is "certain" he was "trying to tell the police [he] was not 100%
 15 sure" they were the men who had assaulted him, and that he "was not willing to make a positive
 16 identification of [the] men[]" in his written statement. (Dkt. 50.)²

17 Richardson did not hear Fantozzi make the identification. (Dkt. 25 at 6.) He attests
 18 Kelly communicated to him a positive identification had been made and he proceeded to read
 19 Lawson and Franklin their Miranda rights. (*Id.*) Following the arrest, Lawson and Franklin
 20

21 2 Fantozzi attested in his first declaration he wrote his statement regarding the assault (*see* Dkt.
 22 24, Ex. B) before he went to the show-up. (Dkt. 24 at 3.) In his subsequent declaration, Fantozzi
 states that, while he is not certain when he started writing the statement, he "did not finish writing it until
 after" he was taken to see Lawson and Franklin. (Dkt. 50 at 1-2.)

01 were placed in patrol cars and transported to the West precinct. (*Id.*)

02 In addition to the above incidents, Lawson and Franklin point to various statements
 03 made by Richardson, some of which can be overheard on police in-car video recordings.³
 04 They assert, for example, that Richardson and other officers made fun of Lawson's middle
 05 name (Precious), stating: "'Did that hurt Precious,' 'Oh, are you ok Precious,' and 'Did your
 06 mommy name you Precious[?]" (Dkt. 42 at 3; Dkt. 44 at 3.) Franklin points to comments by
 07 Richardson that Franklin was "going to jail for robbery[,] and Richardson was "going to make
 08 stuff up[,] . . . [m]aybe jaywalking." (Dkt. 42 at 5.) He also points to various other
 09 comments, such as Richardson calling him a "fucking prick[.]" making comments about his
 10 hairstyle, and the following: "Credit cards in his own name, [damn], he has his own credit
 11 cards in his own name, [damn] it, that always sucks when I see that[.]" "I always hate it when
 12 that happens. I was going to shoot one of them too." (*Id.*)

13 Richardson, in response, notes "a lot of back and forth" between officers and plaintiffs
 14 as captured on in-car video, and describes his tone in making the comments about robbery and
 15 jaywalking as sarcastic. (Dkt. 25 at 6-7.) Richardson also notes Franklin's admission in his
 16 deposition that he did not hear the credit card-related comments at the time, and only later
 17 reviewed them on video. (*Id.* at 7 and Dkt. 22 at 4:24-6:5.)

18 Lawson and Franklin were released in the early morning of November 17, 2010, and,
 19 upon returning to Seattle Municipal Court for arraignment, were told they were not being
 20 charged with anything. (Dkt. 42 at 6; Dkt. 44 at 4-5.) Both maintain ongoing nightmares and
 21 suffering in relation to the events surrounding the stop, arrest, and their detention. (*Id.*)

22 3 There is no in-car video recording capturing the initial stop.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate when a “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of his case with respect to which he has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The Court must draw all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The central issue is “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). The moving party bears the initial burden of showing the district court “that there is an absence of evidence to support the nonmoving party’s case.” *Celotex Corp.*, 477 U.S. at 325. The moving party can carry its initial burden by producing affirmative evidence that negates an essential element of the nonmovant’s case, or by establishing that the nonmovant lacks the quantum of evidence needed to satisfy its burden of persuasion at trial. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). The burden then shifts to the nonmoving party to establish a genuine issue of material fact. *Matsushita Elec. Indus. Co.*, 475 U.S. at 585-87.

In supporting a factual position, a party must “cit[e] to particular parts of materials in the record . . . ; or show[] that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the

01 fact.” Fed. R. Civ. P. 56(c)(1). The nonmoving party “must do more than simply show that
 02 there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co.*, 475
 03 U.S. at 585. “[T]he requirement is that there be no *genuine* issue of material fact. . . . Only
 04 disputes over facts that might affect the outcome of the suit under the governing law will
 05 properly preclude the entry of summary judgment.” *Anderson*, 477 U.S. at 247-48 (emphasis
 06 in original). Also, “[t]he mere existence of a scintilla of evidence in support of the
 07 non-moving party’s position is not sufficient[]” to defeat summary judgment. *Triton Energy*
 08 *Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). Likewise, the nonmoving party
 09 “cannot defeat summary judgment with allegations in the complaint, or with unsupported
 10 conjecture or conclusory statements.” *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d 1107,
 11 1112 (9th Cir. 2003).

12 B. Qualified Immunity Analysis

13 Under the doctrine of qualified immunity, state officials “performing discretionary
 14 functions [are protected] from liability for civil damages insofar as their conduct does not
 15 violate clearly established statutory or constitutional rights of which a reasonable person would
 16 have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether
 17 qualified immunity applies, the Court considers whether the plaintiff alleged sufficient facts to
 18 make out a violation of a constitutional right, and whether the constitutional right was clearly
 19 established at the time of the alleged violation. *Saucier v. Katz*, 533 U.S. 194, 201 (2001),
 20 *modified by Pearson v. Callahan*, 555 U.S. 223 (2009) (explaining “that, while the sequence set
 21 forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory”).

22 The Court takes the facts in the light most favorable to the party asserting the injury in

01 determining whether an official violated a constitutional right. *Acosta v. City of Costa Mesa*,
 02 718 F.3d 800, 825 (9th Cir. 2013) (citing *Saucier*, 533 U.S. at 201). In considering whether a
 03 right is clearly established, “[t]he contours of the right must be sufficiently clear that a
 04 reasonable official would understand that what [the official] is doing violates that right.”
 05 *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The court applies an objective standard;
 06 “the defendant’s subjective understanding of the constitutionality of his or her conduct is
 07 irrelevant.” *Clairmont v. Sound Mental Health*, 632 F.3d 1091, 1109 (9th Cir. 2011) (internal
 08 quotation marks and quoted source omitted). An official who makes a reasonable mistake as
 09 to what the law requires is entitled to immunity. *See Saucier*, 533 U.S. at 295; *Kennedy v. City*
 10 *of Ridgefield*, 439 F.3d 1055, 1061 (9th Cir. 2006).

11 C. Richardson’s Motion for Partial Summary Judgment

12 Plaintiffs assert Richardson violated their Fourth Amendment rights through
 13 unreasonable force and seizure, and assert a number of state law claims. Acknowledging
 14 disputes of fact relating to the kick employed on Lawson,⁴ Richardson does not move for
 15 summary judgment in relation to that use of force. Richardson does, however, seek summary
 16 judgment in relation to the other force applied and all other claims brought in this lawsuit, and
 17 further asserts his entitlement to qualified immunity.

18 1. Fourth Amendment:

19 Plaintiffs raise their constitutional challenges under 42 U.S.C. § 1983, which requires a

20 21 22 4 Lawson alleges that, while he was on his hands and knees on the ground, Richardson kicked him in the face, in the area of his jaw, causing him to fly backwards. (Dkt. 40 at 3-4.) Richardson contends he perceived Lawson as crouching into a squat from which Lawson could have lunged forward, and that he used a flat foot, front push-kick to the center of Lawson’s chest to knock him backwards to the ground. (Dkt. 21 at 6, n.4.)

01 showing that (1) they suffered a violation of rights protected by the Constitution or created by
 02 federal statute, and (2) that the violation was proximately caused by a person acting under color
 03 of state or federal law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Crumpton v. Gates*, 947 F.2d
 04 1418, 1420 (9th Cir. 1991). As there is no dispute Richardson acted under color of state law,
 05 the Court addresses only the Fourth Amendment violations alleged. *See* U.S. Const. Amend.
 06 IV (“The right of the people to be secure in their persons, houses, papers, and effects, against
 07 unreasonable searches and seizures, shall not be violated[.]”) Also, as construed and/or
 08 anticipated by defendant, the Court considers plaintiff’s Fourth Amendment claims as alleging
 09 an absence of reasonable suspicion for Richardson to stop plaintiffs, that the stop was converted
 10 into an arrest, that there was an absence of probable cause for the arrest and imprisonment
 11 following the show-up at the scene with Fantozzi, and the use of excessive force.⁵

12 a. Reasonable suspicion to stop:

13 ““The Fourth Amendment prohibits unreasonable searches and seizures by the
 14 Government, and its protections extend to brief investigatory stops of persons or vehicles that
 15 fall short of traditional arrest.”” *United States v. Valdes-Vega*, 685 F.3d 1138, 1143-44 (9th
 16 Cir. 2012) (quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). *See also Terry v. Ohio*,
 17 392 U.S. 1, 9-10 (1968). To justify a “Terry stop,” an officer must have reasonable suspicion
 18 of an individual’s involvement in criminal activity. *Valdes-Vega*, 685 F.3d at 1144.
 19 ““[R]easonable suspicion exists when an officer is aware of specific, articulable facts which,
 20 when considered with objective and reasonable inferences, form a basis for particularized

21

 22 5 Plaintiffs do not respond to defendant’s contention that the duration of the stop, considered by
 itself, was reasonable. (*See* Dkt. 21 at 13-14.) The Court, therefore, only considers this as a factor
 relevant to the question of whether the stop was converted into an arrest.

01 suspicion.”” *Id.* (quoting *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir.
 02 2000) (en banc)) (emphasis removed). There must be an objective justification for the stop;
 03 more than just a “hunch” of criminal activity. *Id.*

04 The Court looks at the totality of the circumstances in considering the existence of
 05 reasonable suspicion, rather than examining various factors in isolation. *Id.* “This approach
 06 ‘allows officers to draw on their own experience and specialized training to make inferences
 07 from and deductions about the cumulative information available to them that might well elude
 08 an untrained person.”” *Id.* (quoting *Arvizu*, 534 U.S. at 273).

09 In this case, a 911 call reported an assault by two tall, skinny African-American males in
 10 their mid-to-late twenties, both wearing jeans and one wearing a black or dark hoodie
 11 sweatshirt. (Dkt. 23, Ex. A.) At a minimum, and taking the facts in the light most favorable
 12 to plaintiffs, it can be said that Richardson, shortly after the 911 call and in the vicinity of the
 13 assault, observed two black males together, one of whom was wearing the clothing items
 14 identified in the 911 call, and that both individuals saw the police car, “trotted” across a street,
 15 and moved in the opposite direction of Richardson. (See Dkts. 22, 25, 42 and 44.) Plaintiffs
 16 also do not dispute Richardson’s recollection as to an absence of other people in the area.
 17 (Dkt. 25.)⁶ Considering the totality of the circumstances, the Court has no difficulty in
 18 concluding Richardson had reasonable suspicion to make a *Terry* stop.

19 Plaintiffs’ reliance on case law providing that reasonable suspicion must be based on

20 6 Richardson points to a variety of other factors as forming the basis for his reasonable
 21 suspicion, including, *inter alia*, his perception that Lawson was inappropriately dressed for the weather
 22 and acting suspiciously, and his contention that both Lawson and Franklin saw him and, within seconds,
 began to run in the opposite direction. (Dkt. 25.) Lawson and Franklin concede they saw the police
 car, but Lawson states he did not for a moment believe the police car was looking for them, and both
 maintain they were shocked to see Richardson drawing a gun on them in the alley. (Dkts. 42 and 44.)

01 more than a hunch, nervous behavior, and/or moving away from a law enforcement official
02 ignores the totality of the circumstances, including that Richardson's observations and
03 plaintiffs' actions took place close in time and in the vicinity of the assault, and in the absence
04 of other individuals in the same area. *Cf. Moreno v. Baca*, 431 F.3d 633, 642 (9th Cir. 2005)
05 ("nervousness in a high crime area, without more, did not create reasonable suspicion to detain
06 an individual" and the "simple act of walking away from the officers could not have been
07 reasonably mistaken" for recognition that "in some circumstances an individual's flight from
08 law enforcement in a high crime area can justify an investigatory seizure."). In fact, plaintiffs'
09 own expert expressed his agreement as to the existence of reasonable suspicion. (Dkt. 22, Ex.
10 C at 76:19-77:9, 78:25-80:7.) The Court, as such, finds defendant entitled to summary
11 judgment on the issue of reasonable suspicion to conduct a *Terry* stop.

12 b. Conversion of Terry stop into arrest:

13 While a *Terry* stop necessitates only reasonable suspicion, an arrest requires the more
14 demanding standard of probable cause. *Washington v. Lambert*, 98 F.3d 1181, 1185-86 (9th
15 Cir. 1996). A warrantless arrest without probable cause violates the Fourth Amendment.
16 *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

17 "There is no bright-line rule to determine when an investigatory stop becomes an
18 arrest." *Lambert*, 98 F.3d at 1185 (citing *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir.
19 1988)). The Court employs a fact-specific inquiry, considering the totality of the
20 circumstances. *Gallegos v. City of Los Angeles*, 308 F.3d 987, 990 (9th Cir. 2002).
21 Considerations include "both the intrusiveness of the stop, i.e., the aggressiveness of the police
22 methods and how much the plaintiff's liberty was restricted, and the justification for the use of

01 such tactics, i.e., whether the officer had sufficient basis to fear for his safety to warrant the
 02 intrusiveness of the action taken.” *Lambert*, 98 F.3d at 1185 (internal citations omitted). *See*
 03 *also United States v. Buffington*, 815 F.2d 1292, 1300 (9th Cir. 1987) (“The use of force during
 04 a stop does not convert the stop into an arrest if it occurs under circumstances justifying fears
 05 for personal safety.”)

06 Pointing a weapon at and handcuffing a suspect, ordering a suspect to lie on the ground,
 07 or placing a suspect in a police car suggest, but do not automatically convert an investigatory
 08 stop into an arrest. *Lambert*, 98 F.3d at 1186, 1188-89. The duration of the detention may
 09 also be relevant. *Id.* at 1189, n.11. The Court considers whether various factors justify the
 10 use of aggressive and intrusive police tactics, such as: (1) whether the suspect is uncooperative
 11 or takes action raising a reasonable possibility of danger or flight; (2) whether the officer had
 12 information the suspect is “currently armed;” (3) whether the stop closely follows a violent
 13 crime; (4) information a crime that may involve violence is about to occur; (5) specificity of the
 14 information leading the officers to suspect the individuals are the actual suspects, or that the
 15 actual suspects are likely to forcibly resist interrogation; and (6) the number of officers present.
 16 *Id.* at 1189-90. *Compare Gallegos*, 308 F.3d at 991-92 (in a stop lasting forty-five minutes to
 17 an hour, officers reasonably drew their guns on and handcuffed an individual when they were
 18 unsure if he was armed, and brought him back to the area where the crime occurred and he was
 19 originally observed in order to determine whether he was the actual suspect), *with Lambert*, 98
 20 F.3d at 1182-83, 1190-91 (finding warrantless arrest without probable cause where four officers
 21 (with a police dog) drew their guns on, handcuffed, and placed two individuals in police cars for
 22 five to twenty-five minutes, frisked them, and searched their car, despite absence of any

01 specific information either individual was armed, no specific similarities to the actual suspects
02 outside of race, no violent crime in the vicinity shortly before the stop, and no resistance).

03 Richardson here argues the tactics employed, including drawing his weapon, the
04 handcuffing of plaintiffs, and their placement in a prone position on the ground for ten to
05 fourteen minutes, were justified and did not convert the stop into an arrest. In addition to the
06 factors supporting reasonable suspicion, he notes he was alone when he initiated the stop, that
07 he perceived Lawson and Franklin as having run away from him and failing to obey multiple
08 commands to stop, that he observed Franklin with his hands in his hoodie pockets and refusing
09 the order to remove them, and that Lawson refused the command to lay on the ground.

10 Notably, Richardson omits mention of the fact he also kicked Lawson to the ground.
11 Nor does he provide citation to any case law involving a similar tactic. The details surrounding
12 the kick, including the type of kick employed, where it fell on Lawson's body, and the position
13 of Lawson's body at the time, remain in dispute. A determination as to these facts is necessary
14 to the resolution of whether Richardson had sufficient basis to fear for his safety to warrant the
15 intrusiveness of the actions taken.⁷ Further relevant to this issue is the fact that Richardson
16 was apparently aware another officer, Schweiger, had arrived on the scene prior to the kick.
17 (Dkt. 45, Ex. 5 at 5 (Richardson stated in his deposition that Schweiger arrived "within
18 seconds[,]" was "already there as I was kicking the individual backwards[,]" and that
19 Schweiger was able to gain control of Lawson as he was falling back; he knew Schweiger had
20

21 7 The Court disagrees with defendant's contention the kick is not relevant to this motion. As
22 discussed below, the Court declines to separate the different uses of force in the consideration of
plaintiffs' excessive force claim. Nor does defendant in any way explain how the kick would not be
relevant to consideration of whether the tactics employed converted the stop into an arrest.

01 "arrived because I could hear him kind of putting the car in motion, shutting the door."))

02 In addition, and as related to the drawing of the weapon, outside of Richardson's
 03 perception Franklin had his hands in his pockets and refused the command to remove them,
 04 there does not appear to have been any indication either Franklin or Lawson were armed. (See,
 05 e.g., Dkt. 23, Ex. B (CAD report reflects report of "no weapons").) The parties also present
 06 varied depictions and perceptions as to the commands issued by Richardson and the compliance
 07 of plaintiffs in relation to those commands. Finally, Lawson and Franklin were not merely
 08 handcuffed while awaiting the show-up, but were placed on the ground by one or more officers,
 09 maintain their faces were pushed onto the ground during that process, and they remained on the
 10 ground, for some ten to fourteen minutes, with their hands cuffed behind their backs. That
 11 Richardson did not personally perform the act of handcuffing plaintiffs does not render this
 12 evidence irrelevant to the issue of whether the stop was converted into an arrest.⁸

13 The Court, in sum, does not find Richardson entitled to summary judgment in relation to
 14 the stop of Lawson and Franklin. If anything, consideration of the totality of the circumstances
 15 suggests the stop was converted into an arrest. However, a determination as to whether there
 16 was justification for the tactics employed and, therefore, any conversion of the stop into an
 17 arrest, is complicated by the above-described disputed issues of fact.

18 _____

19 8 The cases cited by defendant in relation to the drawing of weapons and handcuffing of
 20 stopped individuals are distinguishable. *See, e.g., Allen v. City of Los Angeles*, 66 F.3d 1052, 1056-58
 21 (9th Cir. 1995) (stop followed high speed chase of over eight miles, ending in a high crime area at night,
 22 involving a car that might have been stolen, and individual alleging unlawful arrest was intoxicated and
 accompanied by noncompliant and combative driver); *Buffington*, 815 F.2d at 1300-01 (police action
 followed tip of informant as to planned bank robbery, suspect had known violent criminal history, was
 wearing a disguise, and was observed to make "antic movements"); *United States v. Taylor*, 716 F.2d
 701, 705, 709 (9th Cir. 1983) (no apparent disputes of fact that individual twice refused commands to
 comply and made "furtive movements inside the truck where his hands could not be seen.").

01 Nor is a determination of qualified immunity in Richardson's favor appropriate. As
 02 stated above, issues of fact preclude a determination as to the justification for the tactics
 03 employed. *See Bravo v. City of Santa Maria*, 665 F.3d 1076, 1087 (9th Cir. 2011) ("Summary
 04 judgment is improper where 'there is a genuine dispute as to the facts and circumstances within
 05 an officer's knowledge or what the officer and claimant did or failed to do.'") (quoting *Hopkins
 06 v. Bonvicino*, 573 F.3d 752, 763 (9th Cir. 2009)). Taking the facts alleged by plaintiffs as true
 07 supports the existence of both a constitutional violation and the conclusion a reasonable police
 08 officer would have known the tactics employed exceeded the boundaries of a valid *Terry* stop.
 09 *See Saucier*, 553 U.S. at 201-02. Accordingly, a finding of qualified immunity on the issue of
 10 whether the *Terry* stop was converted into an arrest is not warranted at this time.

11 c. Unlawful arrest:

12 A plaintiff must establish a lack of probable cause in order to prevail on a § 1983
 13 unlawful arrest claim. *Norse v. City of Santa Cruz*, 629 F.3d 966, 978 (9th Cir. 2010) (citing
 14 *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998)). "Probable cause
 15 exists when the facts and circumstances within the officer's knowledge are sufficient to cause a
 16 reasonably prudent person to believe that a crime has been committed." *Lassiter v. City of
 17 Bremerton*, 556 F.3d 1049, 1053 (9th Cir. 2009). Stated another way, probable cause to arrest
 18 exists when the officer has knowledge or reasonably trustworthy information sufficient to lead
 19 a person of reasonable caution to believe an offense has been or is being committed by the
 20 person being arrested. *United States v. Lopez*, 482 F.3d 1067, 1072 (9th Cir. 2007) (citing
 21 *Beck*, 379 U.S. at 91). Probable cause is an objective standard. *Id.*

22 Richardson argues probable cause to arrest plaintiffs existed following the show-up and

01 positive identification by Fantozzi. Again, Fantozzi initially identified his assailants as two
 02 skinny African-American males in their mid-to-late twenties, both wearing jeans and one
 03 wearing a black or dark hoodie, and Richardson observed Lawson and Franklin, two young
 04 black males, one of whom was wearing a dark hoodie and jeans, in the vicinity of the assault,
 05 shortly after the assault occurred. Richardson was thereafter informed that Fantozzi, not long
 06 after the assault occurred, made a positive identification of Lawson and Franklin as the
 07 individuals who assaulted him. These facts and circumstances support the existence of
 08 probable cause for the arrest at that time. *See generally United States v. Bagley*, 772 F.2d 482,
 09 492 (9th Cir. 1985) (relevant factors in considering reliability of identifications are: "(1) the
 10 opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree
 11 of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of
 12 certainty demonstrated by the witness at the confrontation; and (5) the length of time between
 13 the crime and the confrontation.") (citing *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

14 Plaintiffs assert Officer Kelly "switched to another transmission and communicated to
 15 Richardson that Fantozzi could not identify either Lawson or Franklin[,]" and that Kelly later
 16 purposely failed to communicate with Lawson and Franklin in an effort to conceal the absence
 17 of a positive identification. (Dkt. 40 at 10.) However, these contentions are unsupported by
 18 any citation or reference to evidence in the record, and do not, therefore, suffice to defeat
 19 summary judgment. Fed. R. Civ. P. 56(c)(1); *Hernandez*, 343 F.3d at 1112.

20 Plaintiffs also maintain Fantozzi never gave a positive identification, pointing to his
 21 second declaration and the fact he did not include information about a positive identification in
 22 his written statement. (Dkt. 50 and Dkt. 24, Ex. B.) However, whatever Fantozzi may have

01 been trying to communicate, there is an absence of any indication he actually refuted Kelly's
02 assertion she was going to take his statements as a positive identification. (Dkt. 24 at 3.) (See
03 also Dkt. 45, Ex. 10 at 34:7-12 (Kelly stated in her deposition: "I don't have specifics. I just
04 know from my report that he gave me a positive identification. . . . He positively identified
05 the subjects that were being detained as the subjects who had assaulted him."))

06 Nor is there any indication Richardson had any information other than that a positive
07 identification had been made. As stated above, a determination of probable cause considers
08 the facts and circumstances "within the officer's knowledge[.]" *Lassiter*, 556 F.3d at 1053.
09 Also, as with the existence of reasonable suspicion, plaintiffs' own expert agreed that, once
10 Richardson received information a positive identification had been made, he had probable
11 cause to arrest. (See Dkt. 22, Ex. C at 76:12-77:9.) At the least, and as Richardson argues, he
12 is entitled to qualified immunity for his reasonable reliance on the communication as to
13 identification provided by his fellow officer. *Torres v. City of L.A.*, 548 F.3d 1197, 1212 (9th
14 Cir. 2008) (granting qualified immunity to officer who reasonably relied on information from a
15 fellow officer that the suspect had been positively identified). The Court, for all of these
16 reasons, finds defendant entitled to summary judgment in relation to the unlawful arrest claim
17 following the show-up and positive identification by Fantozzi.⁹

18 d. Excessive force:

19 An excessive force claim is examined under the reasonableness standard of the Fourth
20

21 9 The Court reserves for further consideration defendant's assertion that any damages relating
22 to plaintiffs' arrest and detention are severed from the point he had probable cause for the arrest. See
 Smith v. Kelly, C11-623-RAJ, 2013 U.S. Dist. LEXIS 153172 at *44-56 (W.D. Wash. Oct. 24, 2013).

01 Amendment and the framework outlined by the Supreme Court in *Graham v. Connor*, 490 U.S.
02 386 (1989). *Davis v. City of Las Vegas*, 478 F.3d 1048, 1054 (9th Cir. 2007); *Smith v. City of*
03 *Hemet*, 394 F.3d 689, 700 (9th Cir. 2005) (en banc). “That analysis requires balancing the
04 ‘nature and quality of the intrusion’ on a person’s liberty with the ‘countervailing governmental
05 interests at stake’ to determine whether the use of force was objectively reasonable under the
06 circumstances.” *Smith*, 394 F.3d at 701 (quoting *Graham*, 490 U.S. at 396).

07 The Court first assesses the quantum of force – the type and amount of force – used
08 against plaintiffs, and then considers the totality of the circumstances and factors relevant to the
09 governmental interests at issue, including, but not limited to, (1) the severity of the crime at
10 issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others,
11 and (3) whether he is actively resisting or attempting to evade arrest. *Bryan v. MacPherson*,
12 630 F.3d 805, 824-26 (9th Cir. 2010) (citing *Graham*, 490 U.S. at 396). Whether the force
13 used was objectively reasonable “must be judged from the perspective of a reasonable officer
14 on the scene, rather than with the 20/20 vision of hindsight.” *Graham*, 490 U.S. at 396-97
15 (citation omitted).

16 Because the excessive force inquiry “nearly always requires a jury to sift through
17 disputed factual contentions, and to draw inferences therefrom,” the Ninth Circuit has “held
18 on many occasions that summary judgment or judgment as a matter of law in excessive force
19 cases should be granted sparingly.” *Smith*, 394 F.3d at 701 (quoting *Santos v. Gates*, 287 F.3d
20 846, 853 (9th Cir. 2002)). “This is because such cases almost always turn on a jury’s
21 credibility determinations.” *Id.*

22 Richardson clarifies he moves for summary judgment solely in relation to the pointing

01 of the firearm, routine handcuffing techniques, and the alleged push of Franklin's face into the
 02 ground, and not in relation to the kicking of Lawson. The Court, however, finds such parsing
 03 of plaintiffs' excessive force claim inappropriate. As reflected above, "[d]etermining whether
 04 the force used to effect a particular seizure is 'reasonable' under the Fourth Amendment
 05 requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth
 06 Amendment interests' against the countervailing governmental interests at stake." *Graham*,
 07 490 U.S. at 396. While it appears Richardson may not be held responsible for pushing
 08 Franklin's face into the ground (*see* Dkt. 22, Ex. A at 26:4-13), the intrusion here includes, at a
 09 minimum, a kick, to Lawson's chest or face/jaw, within seconds of the drawing of Richardson's
 10 firearm, in the "low ready" position or directly at plaintiffs. The jury should be allowed the
 11 opportunity to consider all of the force brought to bear against plaintiffs so that the necessary
 12 balance is appropriately weighed. *See, e.g., Hall v. County of Whatcom*, No. C09-1545-RSL,
 13 2011 U.S. Dist. LEXIS 143486 at *12-13 (W.D. Wash. Dec. 13, 2011) (declining to separate
 14 excessive force and state law assault claims related to alleged strikes to testicles, from use of
 15 handcuffs and a " "pain hold""). Defendant, for these reasons, is not entitled to either summary
 16 judgment or qualified immunity on the excessive force claim.

17 2. False Arrest and False Imprisonment:

18 The existence of probable cause, after the identification by Fantozzi, serves as a
 19 complete defense to plaintiffs' state law false arrest and imprisonment claims. *Hanson v. City*
 20 *of Snohomish*, 121 Wn.2d 552, 563-64, 852 P.2d 295 (1993) ("[P]robable cause is a complete
 21 defense to an action for false arrest and imprisonment."); *McBride v. Walla Walla Cnty.*, 95
 22 Wn. App. 33, 38, 975 P.2d 1029 (1999) (same). Defendant is, accordingly, entitled to

01 summary judgment in relation to such claims. However, as neither party addresses the
02 existence or viability of false arrest or imprisonment claims relating to the period prior to
03 Fantozzi's identification, the Court declines to render a ruling associated with any such claims.

04 3. Assault and Battery:

05 Defendant argues that, because the force was reasonable, plaintiffs' state law assault
06 and battery claims must also be dismissed. *See Boyles v. Kennewick*, 62 Wn. App. 174, 176,
07 813 P.2d 178 (1991) ("Generally, a police officer making an arrest is justified in using
08 sufficient force to subdue a prisoner, however he becomes a tortfeasor and is liable as such *for*
09 *assault and battery* if unnecessary violence or excessive force is used in accomplishing the
10 arrest.") (emphasis in original). However, as with the excessive force claim, the Court finds a
11 ruling on plaintiffs' assault and battery claims precluded by disputes of fact.

12 4. Intentional Infliction of Emotional Distress:

13 To prove a claim for intentional infliction of emotional distress (or outrage) under
14 Washington law, plaintiffs must show: (1) extreme and outrageous conduct; (2) intentional or
15 reckless infliction of emotional distress; and (3) actual result of severe emotional distress.
16 *Kloepfel v. Bokor*, 149 Wn.2d 192, 195-96, 66 P.3d 630 (2003). The claim must be predicated
17 on behavior "so outrageous in character, and so extreme in degree, as to go beyond all possible
18 bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized
19 community." *Id.* at 196 (quoted sources, quotation marks, and emphasis omitted). "[M]ere
20 insults, indignities, threats, annoyances, petty oppressions, or other trivialities" do not rise to
21 the requisite level of offending behavior. *Id.* While the question of whether conduct is
22 sufficiently outrageous is ordinarily for a jury, the Court initially determines whether

01 reasonable minds could differ on whether conduct has been sufficiently extreme and outrageous
02 to result in liability. *Phillips v. Hardwick*, 29 Wn. App. 382, 387, 628 P.2d 506 (1981).

03 Defendant observes and plaintiffs do not dispute that, to the extent plaintiffs' allegations
04 of mental distress stem from their allegations of assault and battery and false arrest/
05 imprisonment, they are subsumed and may not be brought as an independent claim of outrage.
06 See *Rice v. Janovich*, 109 Wn.2d 48, 61-62, 742 P.2d 1230 (1987) (finding error in jury
07 instruction allowing for "possibility of double recovery" on both assault and tort of outrage for
08 same conduct). Plaintiffs point to the remaining conduct, including the mockery of Lawson's
09 name, Richardson's comments regarding Franklin's hairstyle and how he would "make stuff
10 up," and the statements regarding Franklin's credit cards as sufficient to support an independent
11 claim of intentional infliction of emotional distress.

12 Plaintiffs fail to explain how the credit card comments, admittedly made outside of
13 Franklin's presence (see Dkt. 22 at 4:24-6:5), could be construed as an intentional or reckless
14 infliction of emotional distress. Moreover, even assuming all facts alleged by plaintiffs as true
15 and drawing all reasonable inferences in their favor, the behavior at issue cannot be said to have
16 been so outrageous and extreme "as to go beyond all possible bounds of decency, and to be
17 regarded as atrocious, and utterly intolerable in a civilized community." *Kloepfel*, 149 Wn.2d
18 at 196. "The law intervenes only where the distress inflicted is so severe that no reasonable
19 person could be expected to endure it." *Saldivar v. Momah*, 145 Wn. App. 365, 390, 186 P.3d
20 1117 (2008). Here, while clearly unprofessional and objectionable, Richardson's comments
21 and behavior are appropriately described as "insults, indignities, threats, annoyances, petty
22 oppressions, or other trivialities[]" not rising to the level of offending behavior required for a

01 claim of outrage. *Kloepfel*, 149 Wn.2d at 196. *Cf. id.* at 194 (conduct supporting outrage
 02 claim included, *inter alia*, violations of no contact orders resulting in multiple convictions,
 03 threats to plaintiff's life and to the life of man she was dating, 640 and 100 phone calls to
 04 plaintiff's home and work respectively, driving by her house at all hours, and resulting in
 05 plaintiff's need to spend weekends away from home and for her employer to make
 06 arrangements to protect her at work). Defendant is, as such, entitled to summary judgment on
 07 the claim of intentional infliction of emotional distress (outrage).¹⁰

08 5. Negligent Infliction of Emotional Distress and Negligence:

09 Plaintiffs also assert claims of both negligent infliction of emotional distress and
 10 negligence. In either case, a cause of action exists "only if 'the defendant owes a duty of care
 11 to plaintiff.'" *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 27, 134 P.3d 197 (2006) (quoting
 12 *Chambers-Castanes v. King Cnty.*, 100 Wn.2d 275, 284, 669 P.2d 451 (1983)); *see also Strong*
 13 *v. Terrell*, 147 Wn. App. 376, 387, 195 P.3d 977 (2008) (plaintiff may recover for negligent
 14 infliction of emotional distress upon proving "negligence, that is, duty, breach of the standard
 15 of care, proximate cause, and damage," and "the additional requirement of objective
 16 symptomatology.")

17 "As a general rule, law enforcement activities are not reachable in negligence." *Keates*
 18 *v. City of Vancouver*, 73 Wn. App. 257, 267, 869 P.2d 88 (1994). Under the public duty
 19 doctrine, "[w]hen the defendant is a public official . . . no liability will attach for a public
 20 official's negligent conduct unless the plaintiff can show that the duty was owed to [him] rather

21

 22 10 Finding the conduct alleged insufficient to constitute intentional infliction of emotional
 distress, the Court does not address the parties' arguments regarding evidence plaintiffs suffered actual
 emotional distress relating to the events at issue in this matter.

01 than to the general public.” *Donaldson v. City of Seattle*, 65 Wn. App. 661, 666, 831 P.2d
 02 1098 (1992) (citing *Taylor v. Stevens Cnty.*, 111 Wn.2d 159, 759 P.2d 447, 449-50 (1988)).
 03 See also *Hernandez v. Kunkle*, C12-178-RSM, 2013 U.S. Dist. LEXIS 6701 at *25 (W.D.
 04 Wash. Jan. 15, 2013) (“Courts recognize four exceptions to the public duty doctrine: (1)
 05 legislative intent, (2) failure to enforce when there is actual knowledge of a statutory violation,
 06 (3) failure to exercise reasonable care when coming to the aid of a particular plaintiff, and (4)
 07 where the injured plaintiff has a special relationship entailing a separate duty from that owed
 08 the general public.”) (cited source omitted).

09 As Richardson observes, plaintiffs may not base claims of negligence on alleged
 10 intentional actions, such as excessive force or unlawful arrest. *Willard v. City of Everett*,
 11 C12-14-TSZ, 2013 U.S. Dist. LEXIS 126409 at *5 (W.D. Wash. Sep. 4, 2013). Moreover,
 12 plaintiffs’ negligence claims are barred by the public duty doctrine given their failure to identify
 13 any duty owed to them, or exception to that doctrine. While plaintiffs suggest the Court look
 14 to some “alternate duty of reasonable care” (Dkt. 40 at 23-24), they fail to identify any such
 15 duty recognized under the law or applicable to this case. See, e.g., *Rengo v. Cobane*,
 16 C12-298-TSZ, 2013 U.S. Dist. LEXIS 91613 at *14-15 (W.D. Wash. Jun. 28, 2013) (“Police
 17 officers owe no duty to use reasonable care to avoid inadvertent infliction of emotional distress
 18 on the subjects of criminal investigation.”) (citing *Keates*, 73 Wn. App. at 267); *James v. City of*
 19 *Seattle*, C10-1612-JLR, 2011 U.S. Dist. LEXIS 142680 at *54-55 (W.D. Wash. Dec. 12, 2011)
 20 (“[W]hile it is true that the officers ‘owe[] a general duty to all [] citizens [of the City] to avoid
 21 the use of excessive force when effectuating an arrest, it cannot be said that they owe [the
 22 plaintiff] a specific duty.”) (quoted sources omitted). Defendant is entitled to summary

01 judgment on plaintiffs' negligent infliction of emotional distress and negligence claims.¹¹

02 D. City of Seattle's Motion for Summary Judgment

03 Plaintiffs also seek to hold the City of Seattle liable under § 1983 and in relation to their
04 state law claims. In response to defendant City of Seattle's motion for summary judgment,
05 plaintiffs provide clarification as to the nature of their municipal liability claim under § 1983 –
06 addressing only the issue of excessive force and contending a violation of their constitutional
07 rights through a policy or custom of “authorizing Seattle Police Officers to use excessive force
08 against citizens without justification.” (Dkt. 39 at 1-2.) The Court, as such, limits its
09 consideration of municipal liability under § 1983 to the claim as clarified by plaintiffs.¹²

10 1. Municipal Liability Under § 1983:

11 A local government unit or municipality can be sued as a “person” under § 1983.

12 *Monell v. Dep’t of Social Servs.*, 436 U.S. 658, 691-94 (1978). However, a municipality may

13 11 Plaintiffs moved to strike the opinions of defense expert Grant Fredericks and a statement
14 contained within defense expert Jeffrey Noble’s declaration. (Dkt. 40 at 24.) However, having found
no need to utilize that evidence in considering the pending motions, the Court declines to address the
motion to strike.

15 12 The Court further finds plaintiffs to have abandoned any federal or state municipal liability
16 claims associated with a failure to train, ratification of an unconstitutional act, and/or negligent
supervision, and defendant entitled to summary judgment in relation to any such claims. *See, e.g.,*
Penigar v. County of San Bernardino, No. 12-55857, 2014 U.S. App. LEXIS 4573 at *2 (9th Cir. Mar.
11, 2014) (upholding summary judgment where County submitted evidence its training and supervision
policies were reasonable, and claimant did not offer any evidence to the contrary); *Marsh v. City of San
Diego*, 680 F.3d 1148, 1159 (9th Cir. 2010) (affirming dismissal of failure to train claim where plaintiff
provided no evidence training was inadequate or that additional training was necessary); *Sheehan v. City
& County of San Francisco*, 743 F.3d 1211, __, 2014 U.S. App. LEXIS 3321 at *50-51 (9th Cir. 2014)
(ratification requires a showing the “authorized policymakers approve a subordinate’s decision and the
basis for it.”); ratification theory failed where there was no evidence city “made a deliberate choice to
endorse’ the officers’ actions[.]” and mere failure to discipline does not amount to ratification); *Shope v.
City of Lynnwood*, C10-256-RSL, 2011 U.S. Dist. LEXIS 32069 at *19-20 (W.D. Wash. Mar. 28, 2011)
(plaintiff’s negligent training, supervision, hiring, and retention claim against municipality barred by
public duty doctrine: “The duty of the City to hire, train, retain, and supervise its officers is owed to the
public at large, not to plaintiff individually.”)

01 only be held liable for an official's unconstitutional conduct under § 1983 if such conduct was
 02 caused by a city policy or custom. *Menotti v. City of Seattle*, 409 F.3d 1113, 1147 (9th Cir.
 03 2005) (citing *Monell*, 436 U.S. at 691-94). A municipality cannot be held liable solely because
 04 it employs a tortfeasor, under a *respondeat superior* theory. *Monell*, 436 U.S. at 691.

05 Plaintiffs must show the identified policies or customs were the "moving force" behind
 06 the constitutional violation. *See id.* at 694-95. That is, plaintiffs must demonstrate "a direct
 07 causal link between a municipal policy or custom and the alleged constitutional deprivation."
 08 *City of Canton v. Harris*, 489 U.S. 378, 385 (1989).

09 Plaintiffs here maintain the violations of their constitutional rights occurred as a result
 10 of the City of Seattle's longstanding custom of authorizing, exonerating, and not reprimanding
 11 officers who use excessive force, and that this custom proximately caused their injuries. In
 12 support of this contention, plaintiffs rely in large part on a 2011 report from the United States
 13 Department of Justice (DOJ) finding the Seattle Police Department (SPD) engages in a pattern
 14 or practice of using unnecessary or excessive force (Dkt. 49, Ex. 9), and a report and
 15 supplemental report from plaintiffs' expert (Dkts. 53 and 55). Plaintiffs' expert opines, with
 16 no supporting analysis or explanation, that only one out of 1,216 SPD "use of force" files he
 17 reviewed was recommended for further review; that his review "documents a per se 'rubber
 18 stamping' by the SPD chain of command that any and all uses of force inflicted by their officers
 19 will be 'Within policy.'"; that the "DOJ is correct in their conclusion that the SPD has a custom
 20 and practice of inflicting excessive force on citizens within their jurisdiction.); and that "there
 21 were indications of egregious acts by SPD officers that were not further reviewed but were
 22 found to be 'within policy.'" (Dkt. 53 at 11-12; Dkt. 55, Ex. A.)

01 Defendant moves to strike the portions of the expert reports addressing municipal
 02 liability as both not timely disclosed and lacking in reliability. (Dkt. 62 at 2-7.) The Court
 03 finds these arguments compelling. However, it remains that, even considering this evidence
 04 for the purpose of evaluating the motion for summary judgment, plaintiffs fail to demonstrate
 05 municipal liability under *Monell*.

06 As defendant observes, and as previously found by this Court: “It is not enough to
 07 point to a policy and posit a connection between it and a constitutional violation. To do so
 08 would render *Monell* a ‘dead letter.’” *Caylor v. City of Seattle*, C11-1217-RAJ, 2013 U.S.
 09 Dist. LEXIS 62486 at *50 (W.D. Wash. Apr. 30, 2013) (citing *Oklahoma City v. Tuttle*, 471
 10 U.S. 808, 823 (1985) (“Obviously, if one retreats far enough from a constitutional violation
 11 some municipal ‘policy’ can be identified behind almost any . . . harm inflicted by a municipal
 12 official; for example [the defendant officer] would never have killed [the suspect] if [the city]
 13 did not have a ‘policy’ of establishing a police force.”).) Plaintiffs here, in light of the mere
 14 existence of the DOJ report and its findings and through the generalized and conclusory
 15 opinions in their expert report, fail to demonstrate the requisite causation between a municipal
 16 policy and the conduct at issue in this case. There is, in other words, no evidence supporting
 17 the conclusion that a policy or custom of authorizing and/or not punishing the use of excessive
 18 force as a general matter caused Richardson to draw his gun and kick Larson, as opposed to
 19 Richardson’s perception – whether or not reasonable – that plaintiffs posed a risk to his safety.
 20 See *id.* at *47-48 (rejecting *Monell* claim based on alleged policies of, *inter alia*, “training
 21 skewed toward the use of force and away from de-escalation skills,” rubber stamping unlawful
 22 shootings, and a “use-of-force policy authorize[ing] the use of deadly force without an

01 imminent deadly threat[,]” where there was no evidence such policies caused the officer
 02 defendant to shoot the plaintiff).

03 Plaintiffs also fail to support *Monell* liability through evidence of the SPD’s failure to
 04 discipline Richardson in relation to this and one other, unrelated use of force incident. (See
 05 Dkt. 49, Ex. 6 (March 2005 use of force statement by Richardson).) While a municipal policy
 06 “may be inferred from widespread practices or ‘evidence of repeated constitutional violations
 07 for which the errant municipal officers were not discharged or reprimanded,’ [a] plaintiff
 08 cannot prove the existence of a *municipal* policy or custom based solely on the occurrence of a
 09 single incident or unconstitutional action by a non-policymaking employee.” *Nadell v. Las*
 10 *Vegas Metro. Police Dep’t*, 268 F.3d 924, 929 (9th Cir. 2001) (emphasis in original) (quoted
 11 and cited sources omitted). Indeed, and as also found by this Court, “two isolated examples”
 12 of officers acting pursuant to an alleged policy “are insufficient as a matter of law to
 13 demonstrate a longstanding policy or custom that is the ‘standard operating procedure’ of the
 14 municipality[,”] and “[t]o permit such an inference to suffice would eviscerate the most basic
 15 requirement of a *Monell* claim.” *Morales v. Fry*, C12-2235-JCC, 2014 U.S. Dist. LEXIS
 16 40344 at *44-45 & n.12 (W.D. Wash. Mar. 25, 2014) (citing *Marsh*, 680 F.3d at 1159 (single
 17 instance of violation insufficient to constitute a ‘widespread practice’ that would provide notice
 18 to county that additional training was necessary); *Menotti*, 409 F.3d at 1151 (plaintiff provided
 19 evidence of only two allegedly unlawful searches, which were insufficient to demonstrate a
 20 “longstanding practice or custom [that] constitutes the ‘standard operating procedure’ of the
 21 local government entity”); *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996) (“Liability for
 22 improper custom may not be predicated on isolated or sporadic incidents; it must be founded

01 upon practices of sufficient duration, frequency and consistency that the conduct has become a
02 traditional method of carrying out policy.”))

03 Plaintiffs, in sum, fail to provide evidence supporting a causal link between any alleged
04 policy or custom on the part of the SPD and defendant Richardson’s use of force in this case.
05 The Court, for this reason, finds defendant City of Seattle entitled to summary judgment on the
06 issue of *Monell* liability.

07 2. Municipal Liability in Relation to State Law Claims:

08 As discussed above, while finding other state law claims subject to dismissal, the Court
09 finds summary judgment on plaintiffs’ assault and battery claims precluded by disputed issues
10 of fact, and an absence of argument allowing for a determination as to any state law false arrest
11 or imprisonment claims relating to the period prior to the witness identification. It appears
12 plaintiffs also seek to hold the City of Seattle liable for state law claims of assault and battery
13 and false arrest and/or imprisonment under a theory of *respondeat superior*. (See Dkt. 71 at 2.)
14 Finding no argument specific to the remaining or possibly remaining state law claims under the
15 proposed theory, the Court declines to reach a determination as to municipal liability in relation
16 to any such claims.

17 CONCLUSION

18 Defendant City of Seattle’s motion for summary judgment (Dkt. 19) and defendant
19 Richardson’s motion for partial summary judgment (Dkt. 21) are GRANTED in part and
20 DENIED in part. Specifically, summary judgment is granted as to municipal liability under §
21 1983, in relation to reasonable suspicion for the stop, unlawful arrest following the witness
22 identification, and state law claims of false arrest and imprisonment following the witness

01 identification, intentional and negligent infliction of emotional distress, and negligence. All
02 remaining claims as discussed herein will proceed to trial.

03 DATED this 21st day of April, 2014.

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Mary Alice Theiler
Chief United States Magistrate Judge